TAN SIEW CHING

v.

FATIMAH MAHMOOD; MOHD MUHILI ABU BAKAR (THIRD PARTY)

HIGH COURT MALAYA, SHAH ALAM
LOW HOP BING J
[SUIT NO: MT3-22-1440-98]
16 NOVEMBER 2000

CIVIL PROCEDURE: *Amendments - Third party notice - Whether application to be allowed*

The defendant had applied to the deputy registrar to amend a third party notice and this was allowed with costs. This was an appeal by the third party against the said decision. It was contended that the defendant had failed to state in her application whether reliance was had to O. 20 r. 8 or, O. 16 r. 1(1)(a) and (b) of the Rules of the High Court 1980 ('the RHC'). It was submitted that only O. 16 r. 1(1)(a) applied in the present case.

Held:

[1] The procedural law governing the application for leave to amend a process of the court, *ie*, a writ or a pleading, is contained in O. 20 r. 5 of the RHC. Third party notices fall under the catergory of other documents which proceedings related thereto are regulated by O. 20 r. 8(1). The objective of this procedural law is to achieve the purpose of determining the real question in controversy between the parties to any proceedings, or of correcting any defect or error in any proceedings. (p 274 d-g)

[2] Based on the surrounding facts, the proposed amendment was allowed. The amended third party notice was to be served on the third party's solicitor with corresponding leave to make the necessary and relevant amendment. Thereafter, parties are to proceed by way of O. 16 where relevant and applicable. (p 276 b-d)

[Appeal dismissed with costs. Deputy registrar's decision to grant leave to amend third party notice upheld.]

Case(s) referred to:
Abdul Johari Abdul Rahman v. Lim How Chong & Ors [1997] 1 CLJ 361 ***(refd)***
Abu Bakar v. Mohamed Zain [1967] 1 MLJ 168 ***(refd)***
Hock Hua Bank Bhd v. Leong Yew Chin [1987] 1 CLJ 126; [1987] CLJ (Rep) 126 ***(refd)***

Lembaga Pelabuhan Johor v. The Pacific Bank Bhd [1998] 1 CLJ 742 ***(refd)***
Yamaha Motor Co Ltd v. Yamaha (M) Sdn Bhd & Ors [1983] 1 CLJ 191; [1983] CLJ (Rep) 428 ***(foll)***

Legislation referred to:
Rules of the High Court 1980, O. 16 rr. 1(1)(a), (b), (c), O. 20 rr. 5(1), 8(1), O. 28 r. 8(1), O. 34

For the 3rd party - Amritpal Singh; M/s Pritam Singh Doal & Co
For the defendant - Radin Ariff; M/s Salleh Abas Yaacob & Sofiah

Reported by M Maheswaran

JUDGMENT

Low Hop Bing J:

Appeal
This is an appeal by the third party against the decision of the learned deputy registrar who had on 8 May 2000 allowed with costs the defendant's application in encl. (23) for leave to amend the third party notice dated 24 December 1998, in the manner as indicated in the annexure thereto, in particular:

1. by deleting "70,000 unit" and substituting thereof "untuk 133 lot yang dibeli iaitu, 70 lot untuk plaintif dan 63 lot untuk defendan"; and

2. by deleting "RM490,000" and substituting thereof "RM904,000".

Sole Ground For Application And Affidavit In Support
The ground advanced for the defendant's application for leave to amend the third party notice and as averred in the affidavit in support in encl. (19) is that the amount allegedly paid to the third party to purchase shares in Inchape Timuran was RM904,000 ie, 70 lots for the plaintiff and 63 lots for the defendant.

The affidavit in support (encl. (19)) averred that a total sum of RM904,000 has been paid by way of four cheques by the defendant to the third party.

Objection By Third Party
Encik Amritpal Singh, learned counsel for the third party, in objecting to the defendant's application, and also in resisting the appeal herein, contended that the defendant's application has failed to state whether the defendant was relying on O. 20 r. 8 or O. 16 r. 1(1) and (b) of the Rules of the High Court 1980. He stressed that O. 20 and O. 16 r. 1(1)(b) do not apply and only O. 16 r. 1(1)(a) applies.

Further it was contended for the defendant that the third party is now bringing an action on indemnity which is a new subject matter concerning 133 lots and is different from the original 70 lots. However, he conceded that all the lots are the shares in Inchape Timuran. In any event, he added that there is no affidavit in support of the defendant's application.

Reply By Defendant

Encik Radin Ariff, learned counsel for the defendant, submitted that the defendant is relying on both O. 20 and O. 16 r. 1(1)(a), (b) and (c), to amend the original third party notice which is in encl. (3). He added that the cause of action is the same and specifically relied on O. 16 r. 1(1)(c).

Cik Zuraida Mohd Nasir, learned co-counsel for the defendant, added that the proposed amendment to the third party notice is to bring it in line with the allegation of facts in the affidavit in support of the defendant's application.

Decision Of The Court

By way of recapitulation, the affidavit in support of the defendant's application in encl. (23) is to be found in encl. (19). The original third party notice has been filed as encl. (3) pursuant to the provisions of O. 16.

The procedural law governing the application for leave to amend a process of the court e.g. a writ or pleading is contained in O. 20 r. 5 generally. Pleadings are:

(a) statement of claim;

(b) defence;

(c) counterclaim;

(d) defence to counterclaim; and

(e) reply.

Particulars and further and better particulars are also classified as pleadings.

Other documents, such as a third party notice, would be classified as "other documents", in which case the procedural law governing the amendment thereto is to be found in O. 20 r. 8(1) which merits reproduction as follows:

8. Amendment of certain other documents (O. 20 r. 8)

(1) For the purpose of determining the real question in controversy between the parties to any proceedings, or of correcting any defect or error in any proceedings, the Court may at any stage of the proceedings and either of its own motion or on the application of any party to the proceedings order any document in the proceedings to be amended on such terms as to costs or otherwise as may be just and in such manner (if any) as it may direct.

Order 20 r. 8(1) applies to certain other documents in the same way as O. 20 r. 5(1) applies to a writ or pleading and is clear and unambiguous in that it confers upon the court a very wide discretion to order any document in the proceedings to be amended on such terms as to costs or otherwise as may be just and in such manner (if any) as it may direct. The objective of this procedural law is to achieve the purpose of determining the real question in controversy between the parties to any proceedings, or of correcting any defect or error in any proceedings.

The general and wide powers of the court to grant or refuse leave to amend any pleading under O. 20 r. 5(1) and if I may add by analogy under O. 28 r. 8(1) had been authoritatively stated in a good number of cases, one of which is the Federal Court decision in *Yamaha Motor Co Ltd v. Yamaha (M) Sdn Bhd & Ors* [1983] 1 CLJ 191; [1983] CLJ (Rep) 428 which sets out the governing principles as follows:

1. whether the application is *bona fide*;
2. whether the prejudice to the other party can be compensated with costs;
3. whether the effect of the amendment would change the character of a suit to a suit of a different and inconsistent character.

In *Hock Hua Bank Bhd v. Leong Yew Chin* [1987] 1 CLJ 126; [1987] CLJ (Rep) 126, Abdul Hamid, Acting LP (later LP), observed that all such amendments ought to be made for the purpose of determining the real questions in controversy between the parties to any proceedings as the object of the court is to decide on the rights of the parties.

In *Abdul Johari Abdul Rahman v. Lim How Chong & Ors* [1997] 1 CLJ 361, Abdul Malek Ahmad JCA (now FCJ) in delivering the judgment of the Court of Appeal said that the courts should lean towards granting applications for amendments even when e.g. a new cause of action was raised, provided that it was based on the same facts or arose out of the same transaction subject to an award of costs, and that however late the proposed amendment, it should be allowed if it can be made without injustice to the other side, and that there is no injustice if the other party can be compensated with costs.

It is my considered view that at the end of the day, it is essentially the exercise of a discretion which is conferred upon the court and in the exercise of this discretion, the court has to rely on established judicial principles and to ensure that it is exercised judicially having regard to the facts and circumstances of each individual case.

I am aware of Yong J's refusal of leave to amend the pleading in *Abu Bakar v. Mohamed Zain* [1967] 1 MLJ 168; and in *Lembaga Pelabuhan Johor v. The Pacific Bank Bhd* [1998] 1 CLJ 742 where Abdul Malik Ishak, J also refused leave to amend. Their Lordships were deciding on the exercise of the discretion by reference to the facts and circumstances in their respective individual cases.

On the facts and circumstances before me, and on the foregoing grounds I hold that the proposed amendment should be allowed. I therefore uphold the decision of the learned deputy registrar in granting leave to the defendant to amend the third party notice as proposed in encl. (23). The amended third party notice is to be served on the third party's solicitor on or before 1 December 2001. The third party is also granted corresponding leave to make the necessary and relevant amendment to his answer or defence to the third party notice, if he is inclined to do so, within 28 days of this order ie, on or before 15 December 2001. Thereafter, the parties are to proceed by way of O. 16 where relevant and applicable. Costs of this application to the third party. The substantive matter shall proceed by way of pre-trial case management pursuant to O. 34, as amended *vide* PU (A) 342/2000 which was brought into force with effect from 22 September 2000.